BANK BUMIPUTRA (M) BHD.

v.

LEKTRON CORP. SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. D3-22-1471-89]
15 APRIL 1991

BANKING: *Banking facilities - Credit facilities - 'Blanket cover' - Letter of guarantee - Overdraft facility also given to first defendant guaranteed by the other defendants - Second guarantee attempts to release particular guarantor from obligations - Whether the said second guarantee "shall supersede and cancel" the earlier guarantee - Validity of the guarantee - Whether a triable issue - Whether variation of the contract of loan discharges the guarantors.*

In the O. 14 application the learned SAR had allowed judgment to be entered against the first defendant and given the second, third, and fourth defendants leave to defend. The plaintiffs appealed against the decision *vis-a-vis* the second, third and fourth defendants. The first defendant's appeal was also considered by the learned Judge.

The claim in this action against the first defendant was based on banking facilities referred to as a blanket cover granted to it, the terms of which are set out in the plaintiff bank's letter of 30 June 1981 read together with the first defendant's letter of 24 September 1981 and the plaintiff's letter of 12 October 1981.

The claim against the other defendants is based on a letter of guarantee dated 21 August 1986 executed by each of them guaranteeing the repayment of the amounts due from the first defendant under the blanket cover. The first defendant was also given an overdraft facility on or about 29 November 1983 guaranteed by the other defendants by a letter of guarantee dated 9 May 1985. The amount said to be due on the overdraft facility is the subject of the second claim of the plaintiff in respect of which no averments were made by the defendants (or their Counsel).

Held:

[1] Nothing turns on the said error in the preamble. It cannot be said that there is anything wrong per se with the letter of guarantee of 21 August 1986. Clearly the guarantee covers the advances made pursuant to both the "credit facilities" (also referred to as 'blanket cover') and the advances made pursuant to the letter of offer/loan agreement of 24 July 1985.

[2] The affidavits show that the bank did release Dr. Y from his obligations and that the bank had continued to make fresh advances of the facilities to the first defendant after the 21 August 1986. That is what makes it valid. Whether it replaced some other guarantee is really relevant only in respect of Dr. Y's position - not of those who executed it and delivered it to the bank for the bank to act on it as the bank did. That contention does not provide a *bona fide* triable issue.

[3] The other matter raised as a triable issue was that there was a variation of the contract of loan that discharges the guarantors. It was the first defendant that sought for the use of the facilities in respect of the import of the special paper. The directors of the first defendant are its alter ego. The guarantors were the directors. It follows that the lack of knowledge or consent contention is unacceptable.

[The 1st defendants' appeal dismissed with costs. Plaintiff's appeal allowed with costs. Consequential orders in respect of final judgment against 2nd, 3rd and 4th defendants.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiffs - Nithin Nadkarni; M/s. Skrine & Co.
For the 1st & 2nd defendants - Rajinder Singh Veriah; M/s. Atma Singh Veriah & Co.
For the 3rd & 4th defendants - Alexander R. Anthony; M/s. Alex R. Anthony & Associates

JUDGMENT

VC George J:

In the O. 14 application the learned Senior Assistant Registrar had allowed judgment to be entered against the 1st defendant and given the 2nd, 3rd and 4th defendants leave to defend. Enclosure (25) is the plaintiff's appeal against the decision *vis-a-vis* the 2nd, 3rd and 4th defendants. Enclosure (27) is the 1st defendant's appeal.

The 1st of the claims in this action against the 1st defendant is based on banking facilities referred to as a blanket cover granted to it, the terms of which are set out in the plaintiff bank's letter of 30 June 1981 read together with the 1st defendant's letter of 24 September 1981 and the plaintiff's letter of 12 October 1981.

The 1st of the claims against the other defendants is based on a letter of guarantee dated 21 August 1986 executed by each of them guaranteeing the repayment of the amounts due from the 1st defendant under the blanket cover.

The 1st defendant was also given an overdraft facility on or about 29 November 1983 guaranteed by the other defendants by a letter of guarantee dated 9 May 1985. The amount said to be due on the overdraft facility is the subject of the 2nd claim of the plaintiff in respect of which none of the defendants (or their Counsel) have anything to say.

The letter of guarantee of 21 August 1986 is exhibited as BBMB-6 to Encl. (8). In the preamble, reference is made to an earlier letter of guarantee dated 26 December 1984 that covered the blanket cover. The 4th defendant is incorrectly referred to in the preamble as having been one of the guarantors by the earlier letter of guarantee. The 2nd and 3rd defendants and one Dr. Mohd. Yunus bin Mohamed were the only guarantors there. Apparently Dr. Yunus wanted to be released from his obligations under that guarantee. The letter of guarantee of 21 August 1986 was executed by the 2nd, 3rd and 4th defendants. It is addressed to the plaintiff bank. By Clause 2 the consideration for the guarantee is stated to be the bank agreeing to release Dr. Yunus from his obligations under the earlier guarantee as well as the bank continuing to advance credit facilities to the 1st defendant. The amount guaranteed was payable on demand. The guarantors state by Clause 2 that they agree and confirm that the letter of guarantee of 21 August 1986 "shall supersede and cancel" the earlier guarantee.

Nothing turns on the said error in the preamble. It cannot be said (and it is not being said) that there is anything wrong *per se* with the letter of guarantee of 21 August 1986. Reference however was made to Clause 10 of the guarantee whereby the guarantors state that:

> Further, in consideration of you having agreed to advance the Credit Facilities (clearly a reference to the blanket cover) ... we will jointly and severally indemnify you against all losses or damages arising by reason of you making advances pursuant to the letter of offer/loan agreement dated 24 July 1985 ...

It was contended on behalf of the defendants that because of the said reference to the offer/loan agreement of 24 July 1985 the amounts covered by the letter of guarantee should be restricted to advances made pursuant to such an offer/loan agreement. That cannot be right. Cl. 10 itself refers to the "Credit Facilities" as well as to "advances pursuant to the letter of offer/loan agreement dated 24 July 1985". Clearly the guarantee covers the advances made pursuant to both the "Credit Facilities" (which has also been referred to as the "blanket cover") and the advances made pursuant to the letter of offer/loan agreement of 24 July 1985.

By para. 5 of his affidavit Encl. (30) the 2nd defendant Ismail bin Mohamed states on oath that the plaintiff agreed to the replacement of Dr. Yunus as guarantor by the 4th defendant on the following conditions:

(i) that a fresh loan agreement be entered into between the 1st defendant and the plaintiffs and

(ii) that the then directors of the 1st defendant executed a fresh guarantee in favour of the plaintiffs.

He goes on to state on oath that a fresh loan agreement was executed on 24 July 1985 and that a guarantee pursuant to the said request of the plaintiffs was executed on 24 August 1985. The guarantee is exhibited to the affidavit. The loan agreement is not. The 2nd defendant explains that a copy was not given to the 1st defendant and that the plaintiffs have "hidden away the said loan agreement" which is a serious accusation.

The 2nd defendant contends that the guarantee of 21 August 1986 on which the plaintiff's claim against the guarantors is based "is null and void as the same cannot replace the guarantee dated 26 December 1984 as the 3rd and 4th defendants and I had already executed a fresh guarantee dated 24 August 1985." The argument of Counsel for both the 2nd defendant and for the other defendants in this connection was that because the 2nd, 3rd and 4th defendants had executed that letter of guarantee of 24 August 1985 in replacement of that of 26 December 1984, that of 21 August 1986 cannot replace that of 26 December 1984 and is accordingly "null and void".

All the 3 letters of guarantee issued here were what they are said to be that is letters addressed to the bank. Whether the bank accepts such a letter and acts on it is up to the bank. Counsel for the bank pointed out to paras. 3, 4 and 5 of the reply to defence of the 2nd defendant, Encl. (34) of the Court file, where the bank explains the need to have the letter of guarantee of 21 August 1986 inspite of the fact that the 2nd, 3rd and 4th defendants had issued the letter of guarantee of 24 August 1985. It is in any event to be remembered that because a guarantor had issued more than one guarantee does not *per se* result in the earlier one being cancelled or becoming null and void.

The letter of guarantee of 21 August 1986 addressed and delivered to the bank is by the 2nd, 3rd and 4th defendants. It is they who refer to the earlier guarantee of 26 December 1984 and it is they who say that in consideration of the bank having agreed at the request of the 1st defendant, Dr. Yunus and of the 2nd, 3rd and 4th defendants to release Dr. Yunus from all his obligations and in consideration of the bank "continuing to advance credit facilities" to the 1st defendant up to RM1 million they and each of them guarantee payment on demand ...

The affidavits show that the bank did release Dr. Yunus from his obligations and that the bank had continued to make fresh advances of the facilities to the 1st defendant after 21 August 1986. That is what makes it valid. Whether it replaced some other guarantee is really relevant only in respect of Dr. Yunus's position - not of those who executed it and delivered it to the bank for the bank to act on it as the bank did.

In my judgment the contention does not provide a *bona fide* triable issue.

As to the 2nd defendant's contention that a fresh loan agreement was to be and was executed on 24 July 1985 (and hidden away by the bank), whether it was to be executed and whether it was executed or not does not have any effect on the terms of the guarantee by him and his fellow directors on 21 August 1986. In any event, the letter of the bank dated 24 July 1985 is exhibited to Encl. (29) informing the 1st defendant of the bank's agreement to release Dr. Yunus and asking, it is to be noted not for a new loan agreement but for a fresh guarantee. It does seem improbable that the bank communicated its decision on the matter on 24 July 1985 and that on that very day itself a fresh loan agreement is prepared and is executed. The follow up by the bank on its letter of 24 July 1985 is exhibited by the 2nd defendant. It is dated 1 August 1985 and it is only thereafter that the guarantee called for in the bank's letter of 24 July 1985 was prepared and executed on 24 August 1985 (also exhibited by the 2nd defendant). If as the 2nd defendant says a fresh loan agreement was to be executed, it seems curious that all that was mentioned in the bank's letter of 24 July 1985 was the need of a fresh guarantee. It is equally curious that the guarantee that was asked for in the letter was not asked to be prepared till 1 August 1985 but that the fresh loan agreement that the 2nd defendant says was called for (but about which no mention is made in the bank's letter) was prepared and executed on 24 July 1985 ! It seems to me clear that the 2nd defendant was so grossly mistaken in respect of what had happened that it does not call for a trial to conclude that he in all probability was lying when he deposed that there had been a loan agreement dated 24 July 1985.

The other matter raised as a triable issue was that there was a variation of the contract of loan that discharges the guarantors. The argument was that the bank had in 1981 approved the facilities to enable the 1st defendant to import electronic equipment. The bank had however in 1986 allowed the 1st defendant to use the facilities to import rolls of "woodfree continuous printing paper for computer forms." This it was contended amounted to a variation of the "principal contract" between the bank and the 1st defendant without the consent and knowledge of the guarantors and that thereupon the guarantors were discharged. It was the 1st defendant that sought for the use of the facilities in respect of the import of the special paper. The directors of the 1st defendant are its **alter ego.** The guarantors were the directors. It follows that the lack of knowledge or consent contention is unacceptable. In any event the purpose for the facilities as stated in the letter of offer was "for the importation of electronic equipment and **accessories** from overseas suppliers" (emphasis supplied). I agree with Counsel for the plaintiffs that special printing paper for computer forms falls within the meaning of the word "accessories". Even if it is not the allowing of the facility to be used for the import of the paper was an indulgence granted by the bank to the borrower. By Clause 4(iv) of the guarantee the guarantors have expressly agreed that the guarantors will not be released by any indulgence granted by the bank to the borrower.

This contention and the further contention that the bank granting the indulgence amounts to negligence almost amount to frivolous contentions. They do not provide triable issues.

The 1st defendant's appeal Encl. (27) was dismissed with costs. The appeal Encl. (25) was allowed with costs. Consequential orders in respect of final judgment against the 2nd, 3rd and 4th defendants were entered.

Also found at [1992] 1 CLJ 650